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In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 93

HENRY T. McKINNEY,

Petitioner,

v.

THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al.*,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENT TO BRIEF FOR THE RESPONDENT MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

(Legislative History)

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(Legislative History)

To the Supreme Court of the United States:

During the argument of this case on January 27, 1958, counsel for respondent Missouri-Kansas-Texas Railroad Company requested and was granted leave to file this supplement to its brief, setting forth the legislative history to which such counsel referred.

Selective Service Act of 1948

The Selective Service Act of 1948 originated in two bills, S. 2655 and H. R. 6401, in the 80th Congress, Second Session.

Section 9 (a), (b), (c) (1), (c) (2), and (d) of S. 2655, relating to separation from service and reemployment rights, as that bill passed the Senate[1] on June 10, 1948, read as follows:

> "Sec. 9. (a) Any person inducted into the armed forces under this title for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 4(b) or 4(c) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. In addition, each such person who is inducted into the armed forces under this title for training and service shall be given a physical examination at the beginning of such training and service, and upon the completion of his period of training and service under this title, each such person shall be given another physical examination and, upon his written request, shall be given a statement of physical condition by the Secretary concerned: *Provided*, That such statement shall not contain any reference to mental or other conditions which in the judgment of the Secretary concerned would prove injurious to the physical or mental health of the person to whom it pertains.
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position)[2] in the

[1] Congressional Record, 80th Congress, Second Session, Volume 94, Part 6, page 7681; S. 2655 as it passed the Senate.

employ of any employer and who (1) receives such certificate, and (2) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories, or possessions, or political subdivisions thereof, or the District of Columbia, such person shall—

(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of the employer, be restored to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case;

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of such employer or his successor

in interest, be restored by such employer or his successor in interest to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case;

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is declared to be the sense of the Congress that such person should—

(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of the employer, be restored to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case.

(c) (1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of

absence in effect with the employer at the time such person was inducted into such forces, and shall not be laid-off or discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

(d) In case any private employer fails or refuses to comply with the provisions of *subsection (b) or subsection (c)(1)*, the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with *such provisions* and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action: *Provided*, That any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits of such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prose-

cution thereof specifically to require such employer to comply with such provisions: *Provided*, That no fees or court costs shall be taxed against any person who may apply for such benefits: *Provided further*, That only the employer shall be deemed a necessary party respondent to any such action." (Emphasis supplied.)

Section 8 (a), (b), (c), (d), and (e) of H. R. 6401, relating to separation from service and reemployment rights, as that bill passed the House[2] on June 18, 1948, read as follows:

"Sec. 8. (a) Any person inducted into the armed forces under this act for service, who, in the judgment of those in authority over him, satisfactorily completes his period of service under section 4 (b) shall be entitled to a certificate to that effect upon the completion of such period of service, which shall include a record of any special proficiency or merit attained. The Secretaries of Army, Navy or Air Force shall furnish to the Selective Service System hereafter established a report of separation for each person separated from active duty. In addition, each such person who is inducted into the armed forces under this act for service shall be given a physical examination upon separation and, upon his written request, shall be given a statement of physical condition by the Secretary concerned: *Provided*, That such statement shall not contain any reference to mental or other conditions which in the judgment of the Secretary concerned would prove injurious to the physical or mental health of the person to whom it pertains.

(b) In the case of any such person who, in order to perform such service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate,

[2]Congressional Record, 80th Congress, Second Session, Volume 94, Part 7, pages 8695-8696, 8699, 8829.

(2) is still qualified to perform the duties of such position, and (3) makes written application for reemployment within 90 days after he is relieved from such service or from hospitalization continuing after discharge for a period of not more than 1 year—

(A) if such position was in the employ of the United States Government, its Territories, or possessions or political subdivisions thereof, or the District of Columbia, such person shall be restored to such position or, if such position no longer exists, to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer or his successor in interest shall restore such person to such position, or, if such position no longer exists, to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or, if such position no longer exists, to a position of like seniority, status, and pay.

(c) If any such person is not qualified to perform the duties of such position by reason of disability sustained during such period of service, but is qualified to perform the duties of some other position, then, in the case of paragraphs (A) and (B) of subsection (b), he shall [and in the case of paragraph (C) of subsection (b) it is hereby declared the sense of Congress that he should] be employed at such other position as may provide the nearest possible similarity in seniority, status, and pay.

(d) Any person who is restored to a position in accordance with the provisions of paragraph (A) or

(B) of subsection (b) or of subsection (c) shall be considered as having been on furlough or leave of absence during his period of service in the armed forces, *shall be entitled to all promotions*, increases in pay, vacation rights not otherwise regulated by law, and accumulations of seniority *to which he would have been entitled had he been working for the employer during his period of service in the armed forces*, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer, and shall not be discharged from such position without cause within 1 year after such restoration.

(e) In case any private employer fails or refuses to comply with the provisions of *subsection (b), subsection (c), or subsection (d)*, the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with *such provisions* and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action: *Provided*, That any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits of such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of

any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided*, That no fees or court costs shall be taxed against any person who may apply for such benefits: *Provided further*, That only the employer shall be deemed a necessary party to any such action." (Emphasis supplied.)

After passage of H. R. 6401, the House vacated the proceedings and tabled that bill for consideration of S. 2655.[3]

The House amended S. 2655 by striking everything after the enacting clause and substituting therefor the language of H. R. 6401 as that bill passed the House, including the above quoted provisions which were renumbered Section 9 (a), (b), (c), (d), and (e).[4]

The Senate refused to concur in the House amendment and conferees were appointed.[5] The conferees submitted Conference Report No. 2438, reading in part as follows:[6]

"The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 2655) to provide for the common defense by increasing the strength of the armed forces of the United States, including the reserve components thereof, and for other purposes, having met, after full

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[3]Congressional Record, 80th Congress, Second Session, Volume 94, Part 7, page 8830.

[4]Congressional Record, 80th Congress, Second Session, Volume 94, Part 7, pages 8734, 8737-8738, 8829.

[5]Congressional Record, 80th Congress, Second Session, Volume 94, Part 7, pages 8741, 8823, 8830, 8995.

[6]Conference Report No. 2438, pages 11-13, 80th Congress, Second Session; Congressional Record, 80th Congress, Second Session, Volume 94, Part 7, pages 8996, 9253, 9256-9257.

and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

* * * * *

Separation from Service; Reemployment Rights

SEC. 9. (a) Any person inducted into the armed forces under this title for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 4(b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. In addition, each such person who is inducted into the armed forces under this title for training and service shall be given a physical examination at the beginning of such training and service, and upon the completion of his period of training and service under this title, each such person shall be given another physical examination and, upon his written request, shall be given a statement of physical condition by the Secretary concerned: *Provided*, That such statement shall not contain any reference to mental or other conditions which in the judgment of the Secretary concerned would prove injurious to the physical or mental health of the person to whom it pertains.

(b) In the case of any person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1)

receives such certificate, and (2) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories, or possessions or political subdivisions thereof, or the District of Columbia, such person *shall*—

(i) if still qualified to perform the duties of such position, *be restored* to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of the employer, *be restored* to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case;

(B) if such position was in the employ of a private employer, such person *shall*—

(i) if still qualified to perform the duties of such position, *be restored* by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of

any other position in the employ of such employer or his successor in interest, *be restored* by such employer or his successor in interest to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case,

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the *sense of the Congress* that such person *should*—

(i) if still qualified to perform the duties of such position, *be restored* to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of the employer, *be restored* to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case.

(c) (1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) *shall* be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, *shall* be so restored without

loss of seniority, *shall* be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and *shall* not be discharged from such position without cause within one year after such restoration.

(2) It is hereby declared to be the *sense of the Congress* that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) *should* be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

(d) In case any private employer fails or refuses to comply with the provisions of *subsection (b) or subsection (c)(1)*, the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with *such provisions* and to compensate such person for any loss of wages or benefits suffered by reason of such employers' unlawful action: *Provided*, That any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits of such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any

person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions: *Provided*, That no fees or court costs shall be taxed against any person who may apply for such benefits: *Provided further*, That only the employer shall be deemed a necessary party respondent to any such action." (Emphasis supplied.)

The Managers on the Part of the House (House Conferees) submitted a statement to accompany Conference Report No. 2438, "in explanation of the effect of the action agreed upon by the conferees". The portion of that statement relating to "reemployment rights," reads in part as follows:[7]

"The Senate bill provided that persons completing their periods of service under the Act and securing restoration to their former positions in accordance with the terms of the Act should be restored without loss of seniority. The bill contained a declaration by the Congress to the effect that persons so restored should be restored in such manner as to give them the status in their employment which they would have enjoyed if they had continued in their employment continuously. * * *.

The House bill provided that those restored to positions pursuant to the terms of the Act should be en-

[7] Congressional Record, 80th Congress, Second Session, Volume 94, Part 7, pages 9253, 9267-9268; Conference Report No. 2438, pages 44, 49-50, 80th Congress, Second Session.

titled to all promotions, increases in pay, vacation rights, and accumulations of seniority to which they would have been entitled if they had been working in their old positions during their periods of service. * * *

The conference agreement adopts the language of the Senate bill with respect to reemployment rights * * *".[8]

Both the Senate and House agreed to the conference report and S. 2655, as so amended, became Public Law No. 759.[9] (United States Code, Title 50, Appendix, Sections 451-471.)

From the foregoing, it will be noted that Section 8(d) of H. R. 6401, and Section 9(d) of S. 2655 as amended in the House, provided that a returning veteran "*shall* be entitled to all promotions * * * to which he would have been entitled had he been working for the employer during his period of service in the armed forces" (emphasis supplied) and that Section 8(e) of H. R. 6401, and Section 9(e) of S. 2655 as amended by the House, vested in the Federal Courts power to enforce that provision; that the conferees rejected those House provisions; that the conferees adopted the mandatory language of Section 9(b)(B)(i) that a re-

[8]There were two exceptions: (1) there was eliminated the provision of the Senate bill authorizing and requesting the President to formulate and recommend to Congress plans for the rehabilitation and restraining of veterans; and (2) there was adopted the provision of the House amendment deleting the prohibition against lay-offs of restored veterans, Congressional Record, 80th Congress, Second Session, Volume 94, Part 7, page 8699.

[9]Congressional Record, 80th Congress, Second Session, Volume 94, Part 7, pages 8999 and 9277, Volume 94, Part 8, pages 9353, 9354, 9355, 9356, 9363.

turning veteran "*shall*" be restored to his position or to a position of like seniority, status, and pay; that the conferees adopted the mandatory language of Section 9(c)(1) of S. 2655 that such veteran "*shall*" be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, "*shall*" be so restored without loss of seniority, "*shall*" be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and "*shall*" not be discharged from such position without cause within one year after such restoration; that the conferees adopted the precatory language of Section 9(c)(2) of S. 2655, which declared it to be the "*sense of the Congress*" (emphasis supplied) that a returning veteran "*should*" be restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment; and that the conferees expressly limited the powers of the Federal Courts to enforcement of the mandatory provisions of Section 9(b) and Section 9(c)(1), thereby denying them the power to enforce the precatory provisions of Section 9(c)(2). That such action was deliberate is also shown by the legislative history of the 1956 amendment of Section 9(d).

1956 Amendment of Section 9(d)

Section 9(d) was amended in 1956 by S. 3307, 84th Congress, Second Session. That bill, as introduced on February 28, 1956, read as follows:[10]

> "*Be it enacted, etc.*, That section 9(d) of the Universal Military Training and Service Act, as amended, is amended by striking out 'subsection (b) or subsection (c)(1)' and inserting in lieu thereof 'this section'.
>
> "Sec. 2. The amendment made by the first section of this act shall take effect as of June 19, 1951".

S. 3307 was referred to and reported by the Committee on Armed Services, with the following amendment:[11]

> "Strike out all after the enacting clause and insert in lieu thereof the following:
>
> That section 9(d) of the Universal Military Training and Service Act, as amended, is amended by striking 'or' immediately following 'subsection (b)', inserting a comma in lieu thereof, striking the comma immediately following 'subsection (c)(1)' and inserting in lieu thereof 'or subsection (g)'.
>
> Sec. 2. The amendment made by the first section of this Act shall take effect as of June 19, 1951".

The committee report contains this explanation of the amendment:[12]

> "*The bill as introduced conceivably could have been interpreted to make section 9(c)(2)* of the Universal

[10] Congressional Record, 84th Congress, Second Session, Volume 102, Part 3, page 3451.

[11] Senate Report No. 2087, page 1, 84th Congress, Second Session.

[12] Senate Report No. 2087, page 1, 84th Congress, Second Session.

Military Training and Service Act *enforceable in the Federal courts.* Since *this result was not intended,*[13] the amendment is somewhat less broad in that it extends Federal jurisdiction and the assistance of the United States attorney in the enforcement of the provisions contained in section 9(g) of the Universal Military Training and Service Act." (Emphasis supplied.)

As thus amended, Section 9(d) was changed to read in part as follows:

"(d) In case any private employer fails or refuses to comply with the provisions of *subsection (b), subsection (c)(1) or subsection (g),* the district court of the United States for the district in which such private employer maintains a place of business shall have power * * * specifically to require such employer to comply with *such provisions* * * *." (Emphasis supplied.)

This is the language of Section 9(d) today, *United States Code, Title 50, Appendix, Section 459(d).* As in 1948, the provisions of Section 9(c)(2) are not enforceable.

Respectfully submitted,

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[13]The committee report, under the heading "Legislative Background," also stated: "Persons inducted for 2 years of training and service are protected by sections 9(b), 9(c)(1), and 9(d)." No reference was made to section 9(c)(2). Senate Report No. 2087, page 2, 84th Congress, Second Session.

Certificate of Service

I hereby certify that I have today served a copy of the foregoing supplement to brief of respondent Missouri-Kansas-Texas Railroad Company upon each of the following persons: J. Lee Rankin, Solicitor General, Washington 25, D. C.; Carroll J. Donohue, 506 Olive Street, St. Louis 1, Missouri; Clarence M. Mulholland, 741 National Bank Building, Toledo 4, Ohio; Richard R. Lyman, 741 National Bank Building, Toledo 4, Ohio; and Edward J. Hickey, Jr., 620 Tower Building, Washington 5, D. C.; by mailing a copy to each of them by first-class mail, properly addressed to each of them, with postage prepaid.

Dated February 4, 1958.

/s/ M. E. CLINTON

M. E. CLINTON
Of Counsel for Respondent,
Missouri-Kansas-Texas
Railroad Company.